Countering the Financing of Terrorism: International & Domestic Law & Policy

PRIVATE LITIGATION AGAINST TERRORISM FINANCING

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TERRORISM LAWSUITS AGAINST NON-TERRORISTS

- Initial legislation permitted suits only against terrorists – who often have no US assets
  - No compensation for victims
  - Little impact on reducing terrorism

Lawsuits against terrorists themselves \(\Rightarrow\) Uncollectable default judgments

- Expansion in the past 2 decades:
  - Plaintiffs seek deeper, more accessible pockets
  - Legislatures and courts expanded law to allow claims against non-terrorists who provide funds, support, services to terrorists
COMPETING POSITIONS
Drivers of Legislation and Judicial Results

- Victims want viable sources of compensation
- US law needs to cut the financial “lifeline” to terror organizations

- Legitimate organizations should be able to provide financing and services without having to defend terrorism suits
LITIGATION TARGETS
Examples of Non-Terrorist Defendants

- Banks/lenders providing funds that go to terrorist groups
- Financial services firms facilitating movement of funds
- Corporations conducting business with governments or entities that sponsor terrorism
- Banks and entities accused of affiliation with or of being alter egos of state sponsors of terrorism
- Charities providing humanitarian aid that may be used for terrorist activities
- Social media platforms accused of facilitating terrorism
## CIVIL TERRORISM LITIGATION

### Statutory Bases

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| **The Anti-Terrorism Act of 1990 (ATA)** | • Claims by US nationals for international terrorism  
• Treble damages and fees  
• Aiding and abetting liability under JASTA |
| **Alien Tort Claims Act a/k/a Alien Tort Statute (ATS)** | • Violation of treaties or laws of nations  
• Claims by *foreign* nationals for conduct in the US |
| **Torture Victims Protection Act (TVPC)** | • Claims for “torture” or “extra-judicial killing” under authority of a foreign nation  
• Standing for US or foreign nationals  
• Conduct occurring inside or outside of the US |
| **Terrorism Exception to the Foreign Sovereign Immunities Act (FSIA)** | • Claims by US nationals for personal injury or death against State Sponsors of Terrorism  
• Permits tort claims against foreign states |
Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.

18 U.S.C. §2333(a)
THE ANTI-TERRORISM ACT
Requirements for Civil ATA Claims

■ “National of the United States”
  o Citizen or person who owes allegiance to the US
  o Need not live in the US at the time of the terrorist act
  o Includes “estate, survivors, or heirs” (including non-nationals)

■ “Injured in his or her person, property, or business”

■ Injured “by reason of an act of international terrorism” as defined in 18 U.S.C. §2331(1)
THE ANTI-TERRORISM ACT

Act of International Terrorism - Elements

Acts must:

• Be violent or dangerous to human life
• Be a violation of criminal laws of US or any State
  o “Material support” (incl. “financial services”) (18 USC §2339A/B)
  o “Financing” (18 USC §2339C)
• Appear (objectively, not subjectively) intended to:
  o intimidate or coerce a civilian population,
  o influence a government’s policy by intimidation/coercion, or
  o affect conduct of a government by mass destruction, assassination or kidnapping
• Occur primarily outside the US

18 U.S.C. §2331(1)
THE ANTI-TERRORISM ACT

Liability for Non-Terrorist Defendants

TWO TYPES OF LIABILITY

Primary Liability
- For providing “material support” of terrorist acts or organizations
- Material support can itself be an act of “international terrorism”

Secondary Liability
- Creates liability for “aiding and abetting” designated terrorists
PRIMARY LIABILITY UNDER THE ATA

The Boim III Paradigm

- Boim v. Holy Land Foundation (7th Cir. 2008)
  - U.S. charities provided “material support” to Hamas
  - Primary liability for killing of American teenager in Jerusalem

- Satisfied requirements for Acts of International Terrorism:
  - Violation of criminal laws: Providing “material support” for terrorists or terrorist acts in violation of ATA criminal provisions (18 USC 2339A/B)
  - Violent or dangerous to human life: Judge Posner’s analogy: Financial support is dangerous to human life like giving a “loaded gun” to a child
  - Intent to accomplish terrorist objectives: Defendant charities were ideologically aligned with Hamas
Recent Holdings

- *Boim III* still good law, but courts have been reluctant to extend to financing cases
- “Material support” in violation of ATA criminal provisions is *not* sufficient in itself to be act of international terrorism
- Cases regularly dismissed where plaintiff fails to allege *all elements* of “international terrorism”
  - “Violent or dangerous to human life” element – funding and financial transactions not inherently violent or dangerous to human life
  - “Apparent intent” element - banks/financial firms do not have terrorist intent – their objective is *profit*
SECONDARY LIABILITY

Aiding and Abetting under JASTA

Justice Against Sponsors of Terrorism Act (JASTA)

- Enacted in 2016 to give “broadest possible basis” to seek relief against persons/entities that provide support to designated foreign terrorist organizations (FTOs)

- Adds “aiding and abetting” liability to ATA where:
  - International Terrorism committed by designated FTO
  - Defendant aids and abets by:
    1. knowingly providing substantial assistance
    2. conspiring with person who committed act

18 U.S.C. §2333(d)(2)
ANTI-TERRORISM ACT LIABILITY

Proximate Cause Requirement

- ATA is a “tort statute” – requires proof of causation
- “Proximate cause”
  - Conduct is **substantial factor** in causing injury
  - Injury is **foreseeable consequence** of conduct
- Cases dismissed *on the pleadings* where link between defendant’s conduct and terrorist act is too attenuated
  - Defendant provides services to entity or government that has legitimate functions beyond support for terrorists
  - Superseding causes: giving loaded gun to *parent*, who then decides to give gun to child
ANTI-TERRORISM ACT LIABILITY

Recent Trends in Financing Cases

**Banks/financial services firms liable only where they deal *directly* with FTO (or fundraiser/front organization)**

- Motions to dismiss granted where defendants deal with commercial entities or governments with legitimate functions
  - Causation too attenuated if funds may have legitimate purposes
  - No secondary JASTA liability because *no substantial assistance or conspiracy* with FTO
  - No primarily liability for *international terrorism* because financing not violent and apparent intent is to make a profit

- No civil ATA liability even where conduct evades U.S. sanctions or violates criminal laws
NON-ATA STATUTORY BASES

Civil Terrorism Litigation

1) Alien Tort Statute (ATS)

2) Torture Victims Protection Act (TVPA)

3) Terrorism Exception to Foreign Sovereign Immunities Act
THE ALIEN TORT STATUTE (ATS)
Judiciary Act of 1789

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

28 U.S.C. §1350
Claims under the ATS

- Strictly jurisdictional – no affirmative cause of action
  - Permits *common law* claims for violations of US treaties or “the law of nations” – i.e. universal norms under international law
  - Status of terrorism and terrorism financing uncertain –
    - Courts have not recognized “universal norm against terrorism”
    - *Nahl v. Jaoude* (2d Cir. 2020) (no position on terror financing)
    - But egregious terrorist acts (e.g. suicide bombings, assassinations) have been basis for ATS claims

- Covers claims brought by “aliens” (foreign nationals)
  - Gap filler for ATA, which only covers claims by US nationals
  - Used for foreign plaintiffs in ATA cases
THE ALIEN TORT STATUTE

Limitations on Scope of ATS

- Recent Supreme Court rulings

- Post-*Kiobel*/*Jesner* ATS claims
  - May still permit claims against domestic corporations and individuals (including officers and employees of foreign corporations)
  - Still permit claims for domestic acts of terrorism

TORTURE VICTIMS PROTECTION ACT OF 1991 (TVPA)

- Plaintiff: US or foreign national
- Defendant: individual (e.g. government/corporate official)
- 2 types of conduct:
  1. **Torture** -- intentional infliction of physical or mental pain to obtain confession, punish, intimidate or coerce, or discriminate
  2. **Extrajudicial killing** – deliberated killing not authorized by judgment of court affording judicial guarantees recognized as indispensable by civilized peoples
- “Under actual or apparent authority, or color of law, of any foreign nation”
- Secondary liability against individuals who ordered, abetted, or assisted in torture or extrajudicial killing
- Must exhaust any available local remedies

TVPA §2(a) (codified as note following 28 U.S.C. §1350)
TORTURE VICTIMS PROTECTION ACT

Use for Terrorism Claims

- Statutory basis for claims not permitted under ATA and ATS
  - Unlike ATA, permits claims by US or foreign nationals
  - Unlike ATS, covers conduct in or outside of the US

- TVPA has been used as basis for terrorism litigation against financial supporters
  - Secondary liability creates exposure for officers of corporations that financially support government-condoned torture/killing
  - E.g. In re Chiquita Brands Int’l, Inc. Alien Tort Statute and Shareholder Deriv. Litig. (S.D. Fla. 2016) – secondary liability claims under TVPA against senior executives of the Chiquita banana company alleging that they implemented, reviewed, approved and/or concealed the company’s financial support for a Columbian terror organization that committed human rights abuses
FOREIGN SOVEREIGN IMMUNITIES ACT

Terrorism Exception to the FSIA

- For claims against foreign states
- FSIA amended starting in the mid-1990s to:
  1) Remove immunity of foreign governments for terrorist acts
  2) Create affirmative cause of action for US nationals against officials/employees/agents of State Sponsors of Terrorism

- Requirements for affirmative cause of action
  - Plaintiff: US national (or US military/employee)
  - Defendant: designated State Sponsor of Terrorism (North Korea, Iran, Sudan, Syria) or official/employee/agent
  - Conduct: torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources
  - Arbitration: opportunity to arbitrate if acts occurred in foreign state

28 U.S.C. §1605A
TERRORISM EXCEPTION TO THE FSIA

Expansion under JASTA

- JASTA (2016) expanded exception to immunity to permit money damages claims against any foreign state
  - Not limited to designated State Sponsors of Terrorism
  - Claims for physical injury or death occurring in the US
  - Claims caused by:
    - International terrorism in the US (brought under ATA)
    - Tortious acts (not mere negligence) of the foreign state or its officials/agents, regardless of where the acts occurred

- Does not expand affirmative cause of action under §1605A

28 U.S.C. §1605B
CONCLUSION

■ Current trend: Courts are dismissing cases against financers
  o Legitimate business and financial transactions with governments or commercial entities that have non-terrorist functions
  o Defendant motivated by profit rather than shared ideology
  o Defendant did not deal directly with terrorists or front organizations

■ But not a time for complacency
  o Pendulum may swing back – another 9-11 could provoke new legislation, different approaches by courts
  o Boim is still good law, and JASTA is still an expansive statute
  o Cases are still being brought. Plaintiff lawyers are still looking for ways to go after entities with US assets.
  o The right case can be successful

■ Prudent to know who you are doing business with and to be wary of supporting groups that may have terrorist ties
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